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When the law meets disinformation: Should we fear class actions?

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As of June 2023, every EU Member State must introduce class actions to its legal system. Class (representative) actions allow various organizations to submit a single lawsuit on behalf of a wide group of consumers. Many EU countries have limited experience with this legal procedure. At the same time, these countries face increasing disinformation campaigns, connected especially with the Russo-Ukrainian War. Class actions and disinformation seem to be strange bedfellows, however, their connection could be surprisingly harmful.

A class action is a lawsuit of a consumer group against a single defendant, usually a company. Such a group may consist of thousands of individuals. Joining their similar demands into one lawsuit is efficient and cost-saving, although each demand may be modest. Class actions are traditional and frequently used in the US legal system. According to a survey by Carlton Fields, the spendings of US companies on legal defense against class actions exceeded 3 billion USD in 2021.

The EU decided to establish a US-like class actions system for all its Member States. According to directive 2020/1828, an EU Member State must enable class actions under its national law by June 25, 2023. While the legal systems of certain countries (like the UK, and EU countries like France, Austria, Netherlands, and Poland) already have

this type of lawsuit embedded, for other EU countries this procedure is rather new. When implementing it and dealing with the first cases, the countries should exercise caution. The arrival of class actions coincides with intensive disinformation campaigns being carried out in EU member states, especially in connection with the war in Ukraine. According to Statista, chain emails, webpages, and social media posts containing disinformation reached up to 70% of EU inhabitants. The connection between class actions and disinformation is unexpected, but could bring unpleasant and unintended consequences.

COVID-19 and increased tensions in society

Disinformation and class actions capitalize on similar topics: protection of health, energy prices and services, or privacy. Typical examples appeared with COVID-19. The WHO repeatedly warned that disinformation campaigns

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challenged anti-COVID measures such as vaccinations, respiratory protection, and movement restrictions. At the same time, the US National Law Review reported around 1,200 class actions submitted in the US relating to COVID vaccinations in autumn 2022. In Austria, class actions were used to sue hotel owners, ski resorts, and the government for the inadequate treatment of visitors at the beginning of the pandemic. Finally, in the UK a specific class action inquired whether the insurance for the interruption of business covers pandemic situations. Luckily however, class actions and disinformation remained two distinct phenomena during the pandemic.



Source: Jernej Furman, Flickr.com/91261194@N06

This may change easily though: disinformation and class actions have an impact on one another. Disinformation can help plaintiffs to gather a larger group of consumers for a class action. Sending anonymous chain emails with exaggerated information is a cheap way of recruiting consumers to join a class action. Similarly, submitted class actions can be misrepresented by disinformation engineers to add (alleged) legitimacy to their fake news and fulfill their general goals: increasing tensions and cleavages in society, diverting public attention from certain topics, and even undermining the legitimacy of the current judicial and governmental systems.

Energy prices and meddling with economic stability

Several class actions have already contested the high prices of gas and electricity: UK and US energy suppliers have recently been sued for setting their prices too high through anti-competitive behavior and collusion. Once all EU members allow class actions, new cases are likely to follow and challenge allegedly harmful clauses in contracts or errors in billing or the measurement of consumption. Protests against the high prices of energy were fueled also by disinformation campaigns which were intended to lower EU support for Ukraine during its ongoing war with Russia. Coordinating these campaigns with a class action would be easy. Consequently, the sued energy provider would be immediately disadvantaged from public procurement and tenders and have to dedicate significant spending to its legal and PR defense. This would in turn make energy even more expensive and affect the entire economic system. These effects would be quick, regardless of a later court dismissal of the class action. Additionally, even the failure of such class action sows distrust in the involved consumers in the judicial and state systems, which is the goal of disinformation. Similarly, class actions may focus on banks, insurance or telecommunication companies and carry a strong agenda-setting potential.

Recommendations for governments and judges

So, should EU countries fear class actions due to their synergies with disinformation campaigns? EU directive 2020/1828 contains clauses ensuring that class actions do not exceed their original purpose: consumer protection. However, it is now up to Member State governments to transpose these clauses to national legislation and up to judges to bear in mind the pitfalls of class actions described above. The following recommendations should assist in dispelling the fears related to class actions:

- carefully establish which organizations are entitled to submit a class action: Under the EU directive, a class action can be submitted only by an independent consumer protection organization that has been previously designated by a particular Member State and that can demonstrate 12 months of consumer-protection activities. These criteria should be carefully reviewed firstly by Member States prior to designating any consumer protection organization but also secondly by a judge deciding about a particular class action. It should not be enough to rely on formal verification that the organization was established by consumers more than a year before. Instead, a material review should ensure that the organization has truly engaged in consumer protection in the past without being influenced by side interests. This will contribute to the prompt exclusion of organizations orchestrating biased and subversive lawsuits.
- pay attention to the financing of class actions: The EU directive obliges consumer organizations to disclose the funding of each class action. If the funding leads to a significant conflict of interest, the organization cannot continue in the proceeding. Most judges are not experienced in reviewing claimants' financial sources, because this has been legally irrelevant for individual disputes. Therefore, Member States should provide judges with detailed rules for this in national legislation. Subsequently, the judges must ensure that the class action is not financed by an entity which would pursue subversive interests not related to consumer protection.
- consider related campaigns and promptly correct misinformation: Judges should watch how consumers are recruited for class actions and whether there is any public disinformation relating to it. It is too late to reveal the disinformation in a judgment, because consumers already joined the action and the defendant suffered reputational damage. Since judges usually cannot comment on ongoing proceedings, they may notify the relevant regulatory authorities which then must warn the public by promptly pointing out the obvious disinformation disseminated about a particular class action. In this way, misusing pending class actions for disinformation campaigns should be more difficult.
- explain decisions: Judges should prepare justifications of their decisions that are easy to understand. Press releases should accompany a judgment relating to a class action and clarify its meaning for the public. Thus, it will be harder for disinformation engineers to throw parts of the decision out of context or use a failed class action as an example of dysfunctional court and political systems.